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15 | UNITED STATES DISTRICT COURT

16 | NORTHERN DISTRICT OF CALIFORNIA

17 | SAN JOSE DIVISION

18 | CISCO SYSTEMS, INC.,

19 | Plaintiff,

20 | v.

21 | ARISTA NETWORKS, INC.,

22 | Defendant.

Case No. 5:14-cv-05344-BLF (NC)

ARISTA'S OPENING BRIEF RE ANALYTIC DISSECTION

Dept.:   Courtroom 3 - 5th Floor
Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

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I.   INTRODUCTION

Arista submits this brief to identify the aspects of Cisco's asserted CLI elements that the Court should hold are unprotectable and filter out from the jury's infringement analysis. Subject to reviewing any new declarations or evidence that Cisco submits, Arista believes that the Court can filter out the elements discussed herein now, without hearing live testimony.[1]

For example, the Court should instruct the jury that Cisco cannot claim copyright protection for its use of acronyms and terminology that it took from pre-existing standards or industry jargon. Many of the asserted CLI commands implement functions defined in formal standards, such as setting a parameter defined by the OSPF protocol. In almost every such case, Cisco used the acronyms and terminology from those standards to describe those functions. Similarly, many of the asserted commands use everyday industry jargon that predated Cisco. Just as it isn't creative or protectable to use the term "Golden Gate Bridge" to describe the span between San Francisco and Marin Counties, it isn't creative or protectable to use the term "OSPF" to refer to the OSPF protocol, or to use many other terms that Cisco took from preexisting sources. Cisco may allege that the asserted CLI elements are protectable for *other* reasons, but its use of these preexisting industry terms must be carved out of any claim of protectable expression.

Similarly, the Court should instruct the jury that Cisco cannot claim individual protection for CLI commands, which are discrete, short phrases that are not protectable under copyright law. Cisco has asserted throughout this case, and apparently intends to assert at trial, that *each* of the 506 asserted commands or command fragments is *individually* protectable—as opposed to alleging, e.g., that each asserted interface *as a whole* is a copyrightable compilation. Copyright law prohibits that claim because short phrases, by themselves, are not eligible for copyright protection. Again, Cisco may allege that the asserted CLI elements are protectable for other reasons, but the Court should instruct the jury that individual CLI commands are not themselves protectable.

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[1] The Court also can and should define Cisco's asserted registered works now. As the Court directed at the pretrial conference, Arista will submit a separate short brief on this issue on November 10.

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1   Additional unprotectable elements that the Court can filter out now, without live

2 testimony, are discussed below. Given the nature of the dissection that the Court must perform

3 and the areas of disputed evidence, Arista believes that other issues, including ones related to

4 *scenes a faire* and industry constraints on Cisco's choices, cannot be resolved without live

5 testimony and cross-examination of witnesses.

6 **II.   ARGUMENT**

7   The Court's duty in analytic dissection is to identify elements of the asserted works that

8 are **not** protectable, because "the party claiming infringement may place *no* reliance upon any

9 similarity in expression resulting from unprotectable elements." *Apple Computer, Inc. v.*

10 *Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994) (emphasis in original; citation and internal

11 quotation marks omitted); *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010)

12 (explaining dissection process). Dissection is necessary to ensure that defendants cannot be

13 found liable based on similarities in unprotected material, which is free for anyone to use. But it

14 leaves for the jury to resolve disputed factual issues about creativity and infringement, taking into

15 account limiting doctrines like *scenes a faire*. Thus, as the Court noted at the November 3, 2016

16 pretrial conference, both the Court and the jury will need to consider aspects of the originality and

17 creativity of Cisco's asserted works to perform their respective roles.

18   **A.   Use of pre-existing industry terminology is not protectable.**

19   The Court should identify for the jury as unprotectable all asserted aspects of the Cisco

20 CLI that Cisco took from industry protocols and standards or industry jargon. These terms are

21 identified in Exhibit 1 to the accompanying Declaration of Ryan Wong (Black Amended

22 Appendix K).[2] Although these terms are well-known and ordinary in the networking world—and

23 were so before Cisco used them in CLI commands—they are unfamiliar to the layperson.

24 Without clear instruction on this point, there is a high risk of prejudicial confusion, as jurors may

25 believe that Cisco invented these standard networking terms (or that they are creative) simply

26 _____

[2] To Arista's knowledge, Cisco does not dispute that it took the terms identified in Exhibit 1 from
27 pre-existing sources. Thus, the only question that the Court need decide now is the legal
consequence of its having done so. If Cisco raises a factual dispute as to a particular term, that
28 dispute may be better resolved on a full record after live testimony and cross examination, but
Arista expects that in most or all cases this will not be necessary.

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1   because they appear unusual or unfamiliar to those outside the industry. *See* Ex. 1 (Black Am.

2   App. K).[3]

3   Arista's expert John Black has explained (and Cisco has not disputed) that the vast

4   majority of Cisco's command terms come directly from published industry standards or

5   conventional industry terminology.[4] *See, e.g.,* Ex. 1 (Black Am. App. K) (standards-based and

6   conventional terms in Cisco commands); Ex. 2 (Tr. Ex. 9044)) (standards-based terms); *id.* Ex. 3

7   (Tr. Ex. 9043) (common industry terms); Ex. 4 (Black App. A) (commands from IETF

8   standards); Ex. 5 (Black App. B) (commands from IEEE standards). These formal standards and

9   protocols define requirements that all Ethernet switches must meet, and establish terminology that

10   the entire networking industry uses. Just as a person ordering coffee must state the size and style

11   that she wants (small, medium, or large; black or with cream), network engineers must invoke

12   formal industry standards and invoke parameters defined in those standards.[5]

13   In the vast majority of asserted commands and command fragments, Cisco did so by

14   adopting the acronyms and other terminology used in the standards themselves. In other cases,

15   Cisco used pre-existing industry jargon that predated Cisco. Cisco did not coin these terms or use

16   them in a creative way—it simply took preexisting terminology known throughout the industry

17   and used it in its standard and conventional sense. Like the phone numbers and addresses in *Feist*

18   *Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991), Cisco's use of this

19   conventional terminology is not original and is not protectable. There is nothing creative or

20   original about referring to a feature known throughout the industry by its recognized name, which

21   ---
     [3] Unless otherwise noted, citations to "Ex. ___" are to the Declaration of Ryan Wong.

22   [4] Dr. Black's complete reports, with all of their supporting materials, are already in the Court's
     record in this matter at ECF 379-33 (Opening Report), ECF 379-31(Rebuttal Report), and ECF
23   587-2 (Supplemental Report). Because of the volume of these materials, Arista has re-submitted
     here only those appendices to the reports that are directly cited herein. If desired, Arista can also
24   provide the Court with an additional chambers copy of the complete previously-filed materials
     that support Dr. Black's analysis reflected in his reports.
25
     [5] The industry standards at issue here are different from the de facto industry standard for the CLI
26   itself that has been the subject of Cisco's Daubert and *in limine* motions. Arista offers a few
     examples to illustrate the nature of these standards documents. *See, e.g.*, Ex. 6 (RFC 791) (1981
27   standard defining "internet protocol" and abbreviation as "ip"); Ex. 7 (RFC 1883) (defining
     internet protocol version 6, abbreviated as "ipv6"); Ex. 8 (RFC 793) (1981 protocol defining the
28   Transmission Control Protocol, abbreviated "TCP", for reliable communication in computer
     networks). Arista can submit additional IETF and IEEE standards documents if desired.

3

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1   someone else gave it.[6]

2   Cisco's own documents and witnesses confirm that Cisco deliberately used conventional

3   and well-known terminology to formulate its commands. *See, e.g.,* Ex. 11 (Deposition

4   Compilation) (compilation of deposition excerpts showing Cisco employees consulted standards

5   when authoring commands); Ex. 12 (Kathail Dep. Excerpts) (Cisco wanted commands that are

6   "self-explanatory" and based on "terminology you are using from the networking world"); Ex. 13

7   (Remaker Dep. Ex. 436) at 439 (Cisco document); Ex. 14 (CSI-CLI-00836643–652) at 646–647

8   ("When naming a command, pick names that would be familiar to people in the industry," such as

9   "accepted industry acronym" or an industry's "universal parlance.").

10   Cisco's decision to name networking parameters and functions by their pre-existing, well-

11   known names is no more original or creative than a legal publisher's choice to include standard

12   elements like "names of the parties, the deciding court, and the dates of argument and decision"

13   in reporting a legal decision. *See Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 674,

14   683–84 (2d Cir. 1998). Although there were variations in how a publisher could choose to

15   describe aspects of a case, the *Mathew Bender* court found that the required "creative spark" for

16   copyright protection was absent because the selection of terms was purely "obvious, garden-

17   variety, or routine" in its factual context. *Id.* at 682. Cisco's decision to use pre-existing industry

18   terminology in its conventional sense is no more creative or original than the selections rejected

19   in *Matthew Bender*, and the terms Cisco chose are equally unprotectable.

20   Likewise, in *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340

21   (1991), the Supreme Court held that names, addresses, and telephone numbers were unprotectable

22   elements of a phone book, although it considered separately whether the plaintiff had "selected,

23

24   [6] Other courts have held that individual components in a user interface are typically ***not***
      independently protectable, and that to the extent protection exists for interfaces, it will often

25   attach only to a creative selection and arrangement of unprotectable elements, as a whole. *See,
      e.g., Merchant Transaction Sys., Inc. v. Nelcola, Inc.*, No CV-02-1954-PHX-MHM, 2009 WL

26   723001, at *7 (D. Ariz. Mar. 18, 2009) (pre-trial order performing analytic dissection of a
      computer program); *O.P. Sols., Inc. v. Intellectual Prop. Network, Ltd.*, No. 96 CIV. 7952 (LAP),

27   1999 WL 47191, at *11 (S.D.N.Y. Feb. 2, 1999) ("In most cases the constituent elements of the
      user interface or screen display are not independently protectable"; defining unprotectable

28   elements of computer program; collecting cases); *see also* Dkt. 329 (Arista MSJ) at 13-14 (cases
      rejecting protection for command menus, etc.).

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1   coordinated, or arranged" those unprotectable elements in an original way. *Id.* at 362.   This

2   Court should apply that same framework here. Specifically, the Court should instruct the jury

3   that Cisco cannot claim copyright protection for its use of pre-existing industry terminology (such

4   as acronyms and names of protocols and parameters taken from published industry standards), but

5   it may assert originality in its selection, coordination, or arrangement of those unprotectable

6   elements into larger arrangements (subject, of course, to the Court's other dissection rulings and

7   Cisco's disclosures in discovery, and to proof at trial). The Court need not resolve the potential

8   creativity of multi-word combinations of command terms here, but can and should decide now

9   that Cisco's use of acronyms and terminology taken from industry standards or preexisting

10   industry jargon is not creative or protectable and must be excluded from any claim of

11   protectability. *See Sadhu Singh Hamdad Trust v. Ajit Newspaper Advert., Mktg. & Commc'ns,*

12   *Inc.*, 503 F. Supp. 2d 577, 588 (E.D.N.Y. 2007) (finding no creativity in use of the word "Ajit," a

13   name commonly used in India, as part of a newspaper logo, although refusing to grant summary

14   judgment against the logo as a whole).

B.   Individual commands are unprotectable under the words and short phrases doctrine.

16   Cisco is not entitled to copyright protection for any of its individual multi-word

17   commands under the words and short phrases doctrine—but at a minimum, the Court should

18   instruct the jury that the hundreds of individual asserted commands of four keywords or fewer are

19   unprotectable. These commands are short functional descriptors, often referred to as logical

20   "knobs," used to invoke certain technical features of a device. *See infra* Part II.L (discussing

21   evidence). Although Cisco may attempt to prove that its commands are protected as part of a

22   larger arrangement, the individual commands are short phrases that do not qualify for separate

23   protection under the law.[7] *See e.g.*, ECF 552-1 at 3–33 (Cisco's asserted commands); Ex. 22

---

[7] Cisco claims as protectable hundreds of commands consisting of two or three command
keywords, and hundreds more that are only four keywords long. Although some of the asserted
keywords are hyphenated, each names a single discrete feature or function being controlled, using
its conventional name in the industry, and should be treated as a single element. Although
hyphenated, each keyword is logically a single unit in the same way that a proper name like "San
Jose" would be.

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1   (Black Rebuttal Rpt.) ¶¶ 123–24 (188 commands are only two words; 208 are three words; 420

2   are three words or fewer); Ex. 1 (Black Am. Ex. K); Ex. 22 (Black Rebuttal Rpt.) ¶¶ 668-70.

3   Words and short phrases, including titles, slogans, and other types of short ordinary

4   phrases, are not protectable under the copyright regulations and long-standing precedent. *See* 37

5   C.F.R. § 202.1(a). For example, in *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, the

6   First Circuit discussed this rule at length and found no protection for a series of lengthy

7   catchphrases used in radio advertising, including phrases like "clock in and make $50 an hour."

8   97 F.3d 1504, 1519–20 (1st Cir. 1996). The court explained that it is "axiomatic that copyright

9   law denies protection to 'fragmentary words and phrases' and to 'forms of expression dictated

10   solely at functional considerations'" because such materials lack the creativity to warrant

11   copyright protection. *Id.* at 1519. Likewise, in *Alberto-Culver Co. v. Andrea Dumon, Inc.*, the

12   Seventh Circuit found no protection for the phrase "the most personal sort of deodorant." 466

13   F.2d 705, 711 (7th Cir. 1972).

14   The Ninth Circuit applied the same rule in *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir.

15   1989), to bar protection for various phrases that a fiction writer had allegedly copied from a non-

16   fiction history of Jewish migration. Because the phrases at issue were primarily factual (like the

17   functional commands here), and "ordinary" in their factual context, the Court found that they

18   were not protectable under the words and short phrases doctrine—even though some were

19   lengthy. For example, *Narell* barred protection for phrases like "rekindle old memories" and

20   "hordes of gold seekers," as well as lengthier phrases including "shanties and corrugated [metal]

21   shacks . . . were crowded together," "beach was strewn with boxes, bales," and "river wound its

22   way between muddy banks crawling with alligators." *Id.* at 911. The court found that all of these

23   phrases were too "ordinary" and contained too little expression to receive protection, and that by

24   copying them the defendant had simply copied "unprotected factual details." *Id.* at 911–12; *see*

25   *also Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1384–85 (Fed. Cir. 2007) (no protection for 3–5

26   word functional phrases from a set of CPR instructions); *Greene v. Ablon*, 914 F. Supp. 2d 110,

27   117 (D. Mass. 2012), aff'd, 794 F.3d 133 (1st Cir. 2015) (applying rule to find no protection for

28   lengthy "fragmentary phrases" of more than ten words); *Pelt v. CBS, Inc.*, No. CV-92-6532, 1993

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1 WL 659605, at *3 (C.D. Cal. Oct. 25, 1993) ("Listen Up, It's More Than Talk, It's Feeling").

2 Cisco's commands are even shorter and no less ordinary.[8]

3 ### C. Command terms and conventional command syntax that Cisco copied from other sources are not protectable.

4

5 Originality is the touchstone for copyright protection: Cisco cannot claim protection for

6 anything taken from others' pre-existing works. 17 U.S.C § 102(a). Here, that includes a number

7 of command words and basic command syntax that were taken by Cisco from pre-existing

8 command languages and so cannot be protected by Cisco's copyright.[9] The original Cisco OS,

9 which was developed at Stanford, borrowed conventional terminology and command formatting

10 from operating systems running at Stanford itself, such as the "TOPS-20" OS that Mr. Lougheed

11 worked with at Stanford. Ex. 20 (Black Rpt.) ¶¶ 548–82. The asserted command terms taken

12 from pre-Cisco systems include "banner", "boot", "clock", "clear", "enable", "erase", "load",

13 "set", "show" and "terminal." *See, e.g.,* Ex. 19 (Tr. Ex. 9045) (charting legacy command terms in

14 asserted commands); Ex. 20 (Black Rpt.) ¶ 555 ("clear"); *id.* ¶¶ 559–60 (prior use of "show" and

15 "set" commands); *id.* ¶ 565 ("show" and "clear" commands). Cisco's own Dr. Almeroth concedes

16 that the terms "show," "clear," "help," "ip," "no," "arp," and "bgp" all "existed before Cisco."

17 Ex. 21 (Almeroth Rpt.) ¶ 261.

18 Cisco used these unoriginal command words with pre-Cisco command syntax. Thus, for

19 example, Mr. Lougheed used "show" followed by the relevant attribute to call up status

20 information about the router, just as several legacy products did. *Id.* ¶¶ 559–67, 571, 574, 581;

21 *see also* Ex. 30 (Lougheed 4/4/16 Dep. Excerpts) at 259–60; Ex. 20 (Black Rpt.) ¶¶ 576–78

22 (copying of modes and similar language and structure); *Id.* ¶¶ 548–82; *see also* Ex. 42 (Lougheed

23 11/20/15 Dep. Excerpts) at 175. Cisco has asserted here numerous commands with syntax in the

24 form "[verb] [object or entity] [additional parameters]," including primarily the numerous

[8] Although Cisco will likely claim that *Oracle America, Inc. v. Google Inc.* prohibits the Court from applying the words and short phrases rule to the individual commands here, it does not. *See* 750 F.3d 1339 (Fed. Cir. 2014). The Federal Circuit's *Oracle* decision addressed 7000 lines of "declaring code" asserted as a whole, not "individual lines of code," and Oracle "[wa]s not seeking copyright protection for a specific short phrase." *Id.* at 1363. Because Arista is not seeking to apply the rule to Cisco's overall selection of CLI commands, and Cisco *is* claiming protection for its individual commands, *Oracle* does not apply.

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1   commands that begin with "show" and "clear." *See, e.g.,* ECF 552-1 at 4, 9-11 (IOS commands).

2   This syntax is unprotectable because it was undisputably used in pre-Cisco command languages

3   that Cisco copied. *See* Ex. 20 (Black Rpt.) ¶ 545 (aspects of syntax copied from pre-Cisco CLIs);

4   *id.* ¶ 561 (commands with syntax [show] [object] [parameters]); *id.* ¶¶ 564–567 (pre-Cisco

5   DECnet commands with syntax [command] [entity] [parameter/options]); *id.* ¶ 568–70 (Cisco

6   copying of pre-Cisco syntax); Ex. 15 (Li Dep. Excerpts) at 154, 145–46 (functionality and syntax

7   copied from TOPS-20). The jury should be instructed that these unoriginal command words and

8   command syntax are unprotectable.[10]

9   **D.   No copyright protection is available for any purported selection or**
            arrangement of commands that is not grounded in Cisco's actual works or
10   **that Cisco did not disclose in discovery.**

11   The Court has made clear that Cisco cannot assert as its copyrighted works a compilation

12   of CLI elements assembled by Cisco lawyers and identified as the "Cisco CLI" purely for this

13   litigation. MSJ Order (ECF 482) at 5-6. For the same reasons (and however Cisco's works are

14   defined), Cisco cannot claim as protectable expression any selection or arrangement of CLI

15   commands that was never "authored" by Cisco in the form asserted here, and that was assembled

16   only by Cisco's lawyers for this litigation. Accordingly, the Court should find no protection in

17   Cisco's asserted selection and arrangement of the CLI commands because it was never published

18   as such until this litigation.[11] On the contrary, the sets of commands asserted here are taken from

19   multiple asserted works and comprise only a tiny fraction of each such work—indeed, they

20   comprise only a small fraction of the total commands that each such work recognizes. For

21   example, IOS alone—one of four distinct operating systems asserted here—contains at least

22   16,000 documented CLI commands by Cisco's own count. *See, e.g.,* Ex. 20 (Black Rpt.) ¶¶ 692–

23   693. Using a count more equivalent to the way in which Cisco has defined its "commands" for

24   purposes of this case, the count is an order of magnitude higher. *Id.* (450,000 distinct IOS

25

26   [10] The use of this syntax is also an unprotectable idea or method, and a basic feature of English
     grammar. 17 U.S.C. § 102(b). In a case involving a novel it might or might not make sense to
     dissect a work at this granular a level. It is necessary here, however, because Cisco is attempting
27   to claim separate and individual protectability for such fragmentary and trivial parts of its works.

28   [11] Indeed, Cisco did not describe or register any "compilation" claim when registering its asserted
     works with the Copyright Office. See SAC (ECF 64) Exs. 3-28 (registrations).

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1 commands using Cisco-equivalent count). Also, Cisco has never identified any "creative spark"

2 in the selection itself, as needed to support copyright protection in a selection of unprotectable

3 elements. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). Cisco also has no evidence that

4 the specific selections/arrangements of commands asserted here were authored and "fixed in any

5 tangible medium of expression" before their assertion in this litigation. *See* 17 U.S.C. § 102(a);

6 Ex. 22 (Black Rebuttal Rpt.) ¶ 124 (asserted set of 508 commands does not appear in any

7 registration, manual, or source code).

8   The fact that Cisco's claims about its commands have shifted throughout the case also

9 confirms that the "arrangements" asserted here are mere creatures of litigation. Cisco initially

10 asserted 509 commands, both individually and collectively—ignoring that these were cherry-

11 picked from upwards of a dozen versions of each of four different operating systems. Although

12 Cisco now has segregated the remaining commands into the different operating systems, it still

13 does not account for the fact that its registered works include multiple different versions with

14 subsets of the asserted commands. ECF 552-1 at 34. None of these "arrangements" appear

15 anywhere in an asserted work as an "arrangement." Nor has Cisco ever disclosed a published

16 "arrangement" of commands in response to discovery requests asking for identification of all

17 similarities that formed the basis for the infringement claims. *See* Ex. 40 (Cisco Discovery

18 Responses (Rog 2)). Cisco should be barred from asserting these new operating-system-specific

19 compilations at trial, because they were not disclosed in discovery. FRCP 37(c).

20   **E.**   **Several aspects of the asserted hierarchies are unprotectable.**

21 Cisco's asserted hierarchies are unprotectable to the extent they include unprotectable

22 commands or portions of commands. The hierarchies also suffer additional, separate defects.

23   **1.**   **Hierarchies that were created for litigation are unprotectable.**

24   As with its broader "arrangements" of commands, Cisco has no evidence that its asserted

25 hierarchies are real parts of its registered works, rather than created purely for this litigation. In

26 fact, the hierarchies asserted are drawn from across multiple versions of the operating systems.

27 *See* Ex. 22 (Black Rebuttal Rpt.) ¶¶ 42, 45, 47–48 (hierarchies drawn from multiple operating

28 systems), 99–102. And the asserted hierarchies are also incomplete selections of the actual

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1   hierarchies in Cisco's works. For example, Cisco asserts a "hierarchy" of 7 "bgp" commands that

2   it claims Arista copied from IOS—but IOS actually contains at least 59 "bgp" commands.

3   Compare Ex. 64 (Almeroth Rpt. Ex. Copying-5) (bgp hierarchy) to Ex. 65 (Tr. Ex. 7390) (Cisco

4   manual excerpt listing bgp commands). Cisco's actual "show" and "clear" command hierarchies

5   also include many more commands than Cisco has asserted here. Compare Ex. 64 (Almeroth

6   Rpt. Ex. Copying-5) (show hierarchy) to Ex. 66 (Tr. Ex. 5035) (Cisco manual excerpt listing

7   "show" commands); Ex. 64 Almeroth Rpt. Ex. Copying-5 (clear hierarchy) to Ex. 66 (Tr. Ex.

8   5035) (Cisco manual excerpt listing "clear" commands). The Court should find that Cisco's

9   cherry-picked selections from its actual sets or "hierarchies" of commands are unprotectable.

10   **2.   The idea of grouping commands by their initial words is not
                           protectable.**

11

12   The mere idea of creating a command "hierarchy" by grouping CLI commands by their

    common initial words is not protectable under Section 102(b), as Cisco has conceded. *See* 17

13

    U.S.C. § 102(b); Cisco MSJ Opp. (ECF 372) at 14; Ex. 20 (Black Rpt.) ¶¶ 633–35. The Court

14

    should instruct the jury that this idea is unprotectable, to avoid jury confusion.

15

16   **3.   The asserted hierarchies are unprotectable because they contain no
                           expression separate from their function.**

17   Cisco's asserted hierarchies contain no creative expression that is separate from the

18 creation of the commands themselves, or the idea of organizing commands by their first words.[12]

19 *See, e.g.,* Ex. 22 (Black Rebuttal Rpt.) ¶ 60 & n.17, ¶ 78 (no "creative" or "aesthetic" expression

20 in hierarchies); 17 U.S.C. § 102(b); *Apple*, 35 F.3d at 1444; *Mattel*, 616 F.3d at 913. Assembling

21 the hierarchies asserted here was no more creative than listing names in a phone book in

22 alphabetical order: once Cisco chose to use the command "show" to display information, there is

23 no creativity in using that same command to "show" any number of different technical details or

24 parameters, or in grouping such commands together. *See Feist*, 499 U.S. at 363 (alphabetical

25 ordering unprotectable). The same is true for organizing commands by the protocol they relate to

26 (such as the "ip" and "ipv6" protocols), and beginning all such commands with the same

27 descriptive term ("ip" or "ipv6"). Cisco's asserted hierarchies are also simply a basic functional

28 ───────────────
    [12] The commands themselves are not protectable for the reasons stated in Parts II.A–D above.

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1   element of the interfaces that are used throughout the industry. *See e.g.,* Ex. 20 (Black Rpt.) ¶¶

2   105-106 (use of command hierarchies in CLIs); *id.* ¶¶ 682, 684 (functional, not expressive); *id.* ¶¶

3   183–90, 529–35, 581 & Exs. 23-26 (Black Apps. D–G) (industry use of hierarchies); Ex. 22

4   (Black Rebuttal Rpt.) ¶¶ 57–60 (functional nature; rebuttal of Almeroth opinions); *id.* ¶¶ 73–74

5   (legacy CLI features including hierarchies); *id.* ¶ 140 & Ex. 27 (Black App. L.1) (vast majority of

6   networking vendors support the accused hierarchies); Ex. 20 (Black Rpt.) ¶¶ 178–430 (non-Cisco

7   use of hierarchy-based industry-standard CLIs since the mid-1990s); *id.* ¶¶ 545–71 (pre-Cisco

8   DEC products used hierarchical multi-word CLIs).

9   **F.   Cisco's purported selection and arrangement of unprotectable modes and
            prompts is unprotectable.**

10

11   Cisco concedes that it is not asserting the individual mode names and prompts. *See* ECF

      552-1 at 34. To avoid confusion, the jury should be instructed that the individual modes and

12   prompts are unprotectable and cannot be considered as a potential basis for finding infringement.

13

      Cisco claims copyright protection only for its "particular arrangement of modes and

14   prompts." ECF 552-1 at 34. But that "arrangement" is only a small portion of the actual, much

15   more extensive arrangement of modes available in any version of Cisco's operating systems, and

16   Cisco has no evidence that it was conceived or created outside of this litigation. *See, e.g.,* Ex. 28

17   (Cisco User Manual) (70+ non-asserted modes in a single version of Cisco IOS); Ex. 22 (Black

18   Rebuttal Rpt.) ¶ 23; Ex. 29 (Tr. Ex. 9051) (many non-accused Arista modes). Cisco's selection

19   of modes also is not original. *See* Arista MSJ (ECF 329) at 16–17; Ex. 20 (Black Rpt.) ¶¶550–551

20   (TOPS-20 modes); *id.* ¶ 580 (SUMEX modes); Ex. 30 (Lougheed 4/4/16 Dep. Excerpts) 363-

21   371; Ex. 20 (Black Rpt.) ¶ 636 (pre-Cisco modes); Ex. 22 (Black Rebuttal Rpt.) ¶¶ 61–62 (no

22   creative expression). Cisco also cannot claim any creative expression in using a handful of purely

23   functional modes and prompts that describe basic functionality and are used throughout the

24   industry. Ex. 20 (Black Rpt.) ¶¶ 178–79 (summary); Ex. 22 (Black Rebuttal Rpt.) & Ex. 31

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1   (Black Am. App. C) (other vendors use same set of modes/prompts).[13]

2   The function of making certain commands available only in certain modes is also an

3   unprotectable idea (and one that was common in command languages that pre-date Cisco), and

4   should be identified as such for the jury. 17 U.S.C. § 102(b).

G.   The asserted command responses are unprotectable for the same reasons as the commands.

         The jury should be instructed that Cisco's asserted command responses (listed at ECF

552-1, pages 80–96) are largely unprotectable for the same reasons as its commands. Much of

the content of the asserted portions of command responses is drawn from the same standards-

driven terminology as the commands, and is equally necessary to implement the functions and

parameters set by various formal industry standards. *See, e.g.,* Ex. 20 (Black Rpt.) ¶¶ 637–41

(responses describe features and functionality, constrained by standard terms); Ex. 36 (Liu Dep.

Tr.) at 167–72. Thus, Cisco's claims that individual snippets of its command responses are

protectable fail under the copyright law's originality requirement as well as Section 102(b). *See*

supra Parts II.A–II.C (commands). Also, Cisco again cannot prove that the command responses

it asserts here have any real existence as a discrete "collection of outputs" outside of this

litigation, rather than being cherry-picked here to support Cisco's litigation claims. *See* ECF 552-

1 at 80–96 (asserting partial snippets from 38 responses); Ex. 37 (Black MSJ Decl.) ¶ 71 (over

79,000 command responses appear in Cisco IOS alone).

H.   Cisco's asserted help descriptions are unprotectable.

         Cisco's asserted help descriptions are also unprotectable under the short words and

phrases doctrine, for the same reasons as its commands. *See supra* Part II.B. *See* Cisco

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[13] Dr. Black's analysis addresses vendors across the industry. Ex. 20 (Black Rpt.) ¶ 204 (AdTran
AOS uses same set of CLI modes/prompts); *id.* ¶ 215 (Alcatel); *id.* ¶ 222 (Allied Telesis); *id.* ¶¶
233–41 (Avaya, Nortel & Lucent); *id.* ¶¶ 247–51 (Brocade & Foundry); *id.* ¶¶ 264–70, 272 (Dell
& Force10); *id.* ¶¶ 305–07 (D-Link); *id.* ¶¶ 313–17 (Edge-Core); *id.* ¶¶ 323–27 (Ericsson); *id.* ¶¶
328–29 (Redback Networks); *id.* ¶¶ 338–40 (Extreme Networks); *id.* ¶¶ 347–50 (HPE); *id.* ¶¶
367–69 (Juniper); *id.* ¶¶ 384–86 (Lenovo, IBM & BNT); *id.* ¶¶ 391–93 (Netgear); *id.* ¶¶ 396–402
(NextHop, acquired by Arista); *id.* ¶¶ 407–09 (Oracle & Sun); *id.* ¶¶ 418–20 (Procket). *See also*
Ex. 32 (Kasten Depo Excerpts) 62:10-19 (command modes ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮
62:23-63:17 ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮ 63:20-64:13 ▮▮▮▮▮▮▮▮▮▮▮
▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮; Ex. 33 (Cato (Dell) Depo Excerpts) at 37:23-
38:14 (customers expect familiar command modes); Ex. 35 (Venkatraman (HP) Depo Excerpts)
at 64:2-21 (most vendors' switches have privileged modes).

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1 Submission (ECF 552-1) at ¶¶ 98–110 (listing asserted help descriptions); Ex. 38 (Black Supp.

2 Rpt.) ¶¶ 69–72 (summarizing length of help descriptions; 302 of originally asserted 441 strings

3 were 5 words or less); *id.* ¶ 95 (majority of asserted IOS help strings are 4 words or less); *id.* ¶ 99

4 (more than half of asserted IOS-XR help strings are only 2 or 3 words long; vast majority are 6

5 words or less). Also, Cisco's asserted "collections of help descriptions" cannot support

6 infringement because Cisco never disclosed its currently asserted "collections" in discovery.

7 Compare Exs. 9, 10, and 40 (May 27 interrogatory responses and attachments) to ECF 552-1 at

8 98-110. *See* FRCP 37(c). Cisco also has no evidence that the specific "collections of help

9 descriptions" asserted here (purportedly as an original compilation authored by Cisco) have any

10 existence outside of this litigation. On the contrary, the shifting nature of Cisco's claims, and a

11 comparison of Cisco's asserted "collections" to its actual works, prove that they are purely

12 litigation-driven and contain no protectable expression authored by Cisco. *See, e.g.,* Ex. 38

13 (Black Supp. Rpt.) ¶¶ 78, 80 (Cisco IOS interface contains 52,290 unique help strings; Cisco

14 originally asserted a maximum of 336 unique help IOS strings, or ~0.6%)); *id.* ¶¶ 94–96 (9/27/16

15 assertions abandon 124 asserted IOS help strings, leaving a total of 212 distinct IOS help strings

16 asserted); *id.* ¶¶ 97-100 (9/27/16 assertions of 213 distinct IOS-XR help strings include only 0.4%

17 of help strings in IOS-XR). *See also* Ex. 39 (Lougheed 9/16/16 Dep. Excerpts) at 583:7–11,

18 584:17–19, 626:21–23 (Cisco is asserting "entire ensemble" or "entire package" of help strings);

19 Ex. 38 (Black Supp. Rpt.) ¶ 80 (discussing Lougheed testimony).[14]

20   Finally, the jury should be instructed that the concept of providing a help system like the

21 one reflected in the asserted help descriptions here is an idea or system—and a common feature

22 of networking interfaces throughout the industry—and is unprotectable. 17 U.S.C. § 102(b); Ex.

23 38 (Black Supp. Rpt.) ¶¶ 23–24; Ex. 39 (Lougheed 9/16/16 Dep. Excerpts) at 506:6–18; Ex. 38

24 (Black Supp. Rpt.) ¶ 58 (industry-wide use of similar help systems); Ex. 20 (Black Rpt.) ¶ 557

25 (TOPS-20 supported interactive help system).

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[14] Comparison of Cisco's original (ECF 550) and "corrected" lists of protectable elements (ECF 552) shows that Cisco removed roughly 30 more help strings from the "corrected" submission.

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I.   Other basic CLI ideas and functions should also be identified for the jury as unprotectable.

Other aspects of the CLI that are not confined to one specific category above are also

unprotectable under the law barring protection for ideas and systems, and should be identified to

the jury to avoid confusion and decision on an improper basis.[15] 17 U.S.C. § 102(b).

The Court should instruct the jury that Cisco is not entitled to copyright protection for its

choice to use a text-based CLI, in which command words and arguments are typed in at a

command prompt, or to use multi-word commands within that CLI. Cisco has repeatedly referred

to its choice of a text-based CLI as opposed to another means of configuring or managing a

device (such as a graphical user interface) in attempting to justify its claims that the CLI is

protectable. *See* Cisco MSJ (ECF 348) at 2:16–19; Cisco Protectability Brief (ECF 456) at 1:23–

28. However, Cisco has also conceded (as it must) that the idea of using a text-based interface is

not protectable by copyright.[16] *See id.* at 9:13–15. Nor is it original. *See* Ex. 22 (Black Rebuttal

Rpt.) ¶¶ 65–69 (pre-Cisco use of hierarchical and structured multi-word commands); *see also id.*

Ex. 20 (Black Rpt) ¶¶ 105–07, 498–516, 559–67, 545, 547–82, 632–35; Ex. 42 (Lougheed

11/20/15 Dep. Excerpts) at 123–24 (adopting TOPS conventions), 151:7–23 (multi-word

commands in pre-Cisco UNIX and TOPS-20 systems); *id.* Ex. 43 (Satz Dep. Excerpts) at 32:3–8

("every operating system" had used 'show' commands).

In addition, the function of any asserted feature (such as the function of a particular

command, or a mode of operation, or a command response screen) is not protectable under

Section 102(b).

J.   Cisco's asserted snippets from manuals are unprotectable for the same reasons and to the same extent as the CLI elements that they describe.

Cisco has asserted infringement of more than 30 separate Cisco manuals, based on alleged

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[15] In addition, Cisco's overall selection and arrangement of all of its asserted CLI elements (including the commands, hierarchies, modes/prompts, responses, and help strings) is also unprotectable for the same reasons that underlying selections in each category are unprotectable (as explained above). *See* ECF 552-1 at 1 (asserting all "five categories of protectable elements from its user interface . . . together make up the look and feel of Cisco's user interface").

[16] The idea is also not original to Cisco, and in fact text-based interfaces were the only type of interface in use when Cisco created its CLI. Ex. 30 (Lougheed 4/4/16 Dep. Excerpts) at 260:5–9; Ex. 22 (Black Rebuttal Rpt.) ¶¶ 79–83.

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1   copying of small snippets of text. ECF 552. To the extent that Cisco alleges infringement based

2   on similarities in manuals that derive from underlying similarities in CLI commands, responses,

3   modes and prompts, or help descriptions, or terms and parameters from industry standards, the

4   asserted text is unprotectable to the same degree and for the same reasons as the CLI elements

5   themselves, and the jury should be so instructed. Cisco cannot prevent Arista or others from

6   simply identifying unprotectable CLI elements in its technical documentation—any more than it

7   can prevent Arista from using those unprotectable elements in the CLI itself.

8   **K.   Cisco is entitled only to "thin" protection and a virtual identity standard for infringement.**

9   Determining whether broad or thin copyright protection applies is the logical endpoint of

10   the analytic dissection process and should also be done now to provide guidance at trial. Courts

11   have long acknowledged that factual and functional works are entitled to thinner copyright

12   protection than fictional or other artistic works. *See Feist Publications, Inc. v. Rural Tel. Service*

13   *Co.*, 499 U.S. 340 (1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563

14   (1985) ("The law generally recognizes a greater need to disseminate factual works than works of

15   fiction or fantasy."). Under Ninth Circuit law, where design choices are highly constrained by

16   limitations inherent in a certain endeavor, and the range of possible expression is narrow because

17   of functional or other limitations, a copyright holder is entitled to only "thin" copyright

18   protection. Accordingly, after "dissect[ing] the alleged similarities and consider[ing] the range of

19   possible expression," the court "*must* define the scope of the plaintiff's copyright—that is, decide

20   whether the work is entitled to 'broad' or 'thin' protection." *Apple*, 35 F.3d at 1443 (emphasis

21   added). Where the range of possible expression is narrow, copyright protection is "thin" and

22   infringement requires "virtual identity" between the disputed works, rather than the "substantial

23   similarity" required for infringement of a work that receives broad protection. *Apple*, 35 F.3d at

24   1442–43; *see also Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 915 (9th Cir. 2010); *Ets-Hokin*

25   *v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (applying *Apple Computer* and affirming

26   summary judgment; "When we apply the limiting doctrines, subtracting the unoriginal elements,

27   Ets–Hokin is left with only a 'thin' copyright, which protects against only virtually identical

28   copying."); 4-13 Nimmer on Copyright § 13.03.

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1   Here, the evidence shows that the asserted CLI elements are functional, and chosen within

2   a narrow range of possible expression in this highly technical field. Accordingly, copyright

3   protection is "thin" and infringement requires "virtual identity" between the disputed works,

4   rather than the "substantial similarity" required for infringement of a creative work that receives

5   broad protection. *Apple*, 35 F.3d at 1442–43; *Mattel*, 616 F.3d at 915. In contrast to the facts at

6   issue in the Court's recent decision in *Diamond Foods, Inc. v. Hottrix, LLC*, No. 14-cv-03162-

7   BLF, 2016 WL 3880797 (N.D. Cal. July 18, 2016), given the functional purpose and context at

8   issue there is ***not*** a wide range of expression possible for most aspects of a CLI intended to

9   control a networking switch. *Cf. id.* at *8–9 (finding wide range of expression possible in visual

10 design of a popcorn-popping app); *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 696 F.3d 841

11 (9th Cir. 2012) (finding wide range of expression possible for flowered textile design).

12   In this case, as in the Ninth Circuit's *Mattel v. MGA Entertainment* decision, only a

13 narrow range of expression is possible for the selection of asserted CLI features because the

14 industry demands that interfaces for switches include certain features, follow expected patterns,

15 and not launch into free-wheeling "creative" whimsy. *See* Dkt. 380 (Arista Opp. MSJ) at 10–11;

16 Exs. 13, 16, 17 (Cisco documents and testimony). In *Mattel*, only "thin" protection was available

17 for a fashion doll sculpt featuring a stylized female figure with exaggerated features because in

18 practice, the industry demands certain types of features as part of the basic idea for fashion dolls

19 (narrow waists and large eyes), and discourages others (potbellies and large noses). *Mattel,* 616

20 F.3d at 914–15. Similarly here, in practice the Cisco CLI had to use recognizable industry terms

21 and parameters to invoke standard industry protocols and functions—not randomly selected

22 "creative" words. *See id.*; *Data East USA*, 862 F.2d at 209 (protection only against "identical

23 copying" for computer karate game, given "constraints inherent in the sport").

24   **L.   Some disputed issues involve extensive and disputed evidence that must be
            resolved after a live hearing and cross-examination.**

25

26   In addition to the unprotectable portions of Cisco's claims that the Court can identify now

27 on a paper record, other disputes about the nature and extent of copyright protection available to

28 Cisco can only be resolved after live testimony and cross-examination. In particular, Arista will

    prove that Arista cannot be liable for infringement of the asserted CLI commands and other

16

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1   elements because they are *scenes a faire* that flow directly from the commands' functional nature

2   and the industry's preferences and expectations. *See* 17 U.S.C. § 102(b); *Apple Computer, Inc. v.*

3   *Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994); *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d

4   904, 913 (9th Cir. 2010).

5   The parties' evidence on the impact of *scenes a faire* on Cisco's asserted CLI elements is

6   too extensive and disputed to be decided on a paper record. Although Arista believes it should

7   ultimately prevail, Cisco disputes many of the essential facts. Without a full presentation of all

8   related testimony and opportunity for cross-examination, Arista believes the Court will be unable

9   to resolve those disputes. Moreover, the evidence that Arista would need to present on certain

10   issues will overlap with the evidence that the jury must hear anyway to decide Cisco's claims of

11   originality and protectability, and of infringement, as well as fair use. As explained above, the

12   Court's task in dissection is simply to filter out elements of a work that are ***not*** protectable, to

13   prevent the jury from finding infringement on an improper basis. It remains the jury's task to

14   decide whether Cisco has proven that any remaining elements constitute infringement in light of

15   doctrines such as *scenes a faire* and the *de minimis* rule. The Court should not address these

16   issues without hearing live testimony and cross-examination, and should instruct the jury as to the

17   nature of the *scenes a faire* limitation on infringement.

18   Because Cisco maintains that the Court can resolve these issues without hearing live

19   evidence, Arista offers an overview of some of the key evidence, to illustrate for the Court how

20   extensive and contentious these issues are (in light of Cisco's claims that its works reflect

21   "aesthetic" choice and expression). Dr. Black's analysis and testimony will show that external

22   constraints severely restricted Cisco's options in creation of its CLI. *See, e.g.,* Ex. 20 (Black

23   Rpt.) ¶ 644 (industry constraints on development of commands); *id.* ¶ 645 (constraints from user

24   demand for standard industry acronyms, self-explanatory commands, internal consistency across

25   commands, extendable commands, absence of "collisions" in abbreviated commands); *id.* ¶ 646

26   (commands are short-cuts for descriptions of functionality, and it would make no sense to name

27   them other than by using the common terminology used in the industry); *id.* ¶¶ 647–48

28   (discussing evidence of customer demand for use of familiar terminology); *id.* ¶ 649 (very few

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1   word order options available given short length of commands); *id.* ¶ 650 (constraints on

2   commands from limitations of standard "English usage, brevity, clarity, extensibility and

3   efficiency in the parsing of the commands"); *id.* ¶¶ 651–666 (additional detail on these

4   constraints); *id.* ¶¶ 543–642; Ex. 20 (Black Rpt.) ¶ 571 (pre-Cisco use of "show users" and

5   "terminal length" commands). Evidence from Cisco and third parties (including cross-

6   examination of Cisco's expert Dr. Almeroth) will confirm Dr. Black's analysis. *See e.g.* Ex. 11

7   (Deposition Compilation) (Cisco authors consulted industry standards before incorporating

8   standards-driven terms into CLI commands); Ex. 22 (Black Rebuttal Rpt.) ¶ 9 (rejecting

9   Almeroth opinions); Ex. 15 (Tony Li Dep. Excerpts) at 32-38, 41-49, 52-55 (discussing industry

10   standards used at Cisco), 107-110 (explaining industry-wide use of standards-based acronyms).

11   The evidence will also show (though Cisco will dispute it) that early CLI decisions also

12   constrained Cisco's later choices. *See, e.g., id.* at 126–28 (rule in CLI design at Cisco was to

13   follow the "principle of least surprise"); Ex. 22 (Black Rebuttal Rpt.) ¶¶ 72–78, 116–18, 122

14   (need to follow past practices for consistency and ease of use); Ex. 20 (Black Rpt.) ¶¶ 602–13;

15   Ex. 16 (Remaker Dep. Excerpts) at 69–70 (agreeing that "[c]ustomers would expect the CLI

16   commands to use words that would be familiar to people in the industry"); Ex. 17 (Remaker Dep.

17   Ex. 413) at 4 ("CLI is de-facto industry standard, need to continually foster its syntactic and

18   behavioral consistency"; emphasizing need for "consistency" and "rigid CLI structure"); Ex. 13

19   (Remaker Dep. Ex. 436) at 4392; Ex. 14 (Cisco Presentation) at 646–647 ("When naming a

20   command, pick names that would be familiar to people in the industry," such as "accepted

21   industry acronym" or an industry's "universal parlance.").

22   Likewise, Arista will present extensive evidence that CLI commands are merely a

23   functional part of a system or method of operation: digital "knobs" turning on or off, or setting,

24   their respective functionality in the operating system software. *See, e.g.,* Ex. 44 (Remaker Dep.

25   Excerpts) at 57:9–13 ("the command is the knob" for a setting); Ex. 15 (Li Dep. Excerpts) at

26   236:22–24 (describing adding "a knob for" functions); *id.* at 184:7–185:3; Ex. 43 (Remaker Dep.

27   Excerpts) at 75:12-76:8, 100–01 (authors named command by "what it did," borrowing standard

28   terminology), 152:24–153:4 (commands used to "toggle an interface up or down"); Ex. 20 (Black

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1   Rpt.) ¶ 523; Ex. 45 (Cisco email) ("The command should describe the capability and function that

2   you are enabling…"); Ex. 12 (Kathail Dep. Excerpts) at 194 (command words should be "self-

3   explanatory," using "terminology . . . from the networking world"); Ex. 22 (Black Rebuttal Rpt.)

4   ¶¶ 64–73; Ex. 46 (Black App. K.); Ex. 1 (Black Am. App. K). Cisco contends its CLI is an

5   "aesthetic" work.

6   Arista's evidence will also show that other companies engaged in widespread use of

7   identical CLI commands and features, demonstrating the impact of functional constraints on the

8   choices available to Cisco and anyone else in the industry implementing these technical

9   networking features and specifications. *See, e.g.,* Ex. 20 (Black Rpt.) ¶ 191; Ex. 47 (Black Am.

10   App. G); Ex. 48 (Trial Ex. 9039) (multiple top Cisco competitors besides Arista use more than

11   half of the asserted commands); *id.* Ex. 49 (Trial Ex. 9041) (multiple other networking companies

12   use 412 asserted commands; 5 to 18 other companies use 289 asserted commands); Ex. 20 (Black

13   Rpt.) ¶ 274 & Ex. 51 (Black Am. App. H-DE) (Dell also supports at least 268 asserted

14   commands); Ex. 20 (Black Rpt.) ¶¶ 182, 275–300 & Ex. 51 (Black App. I) (overall, Dell shares

15   more than 1600 commands with Cisco); Ex. 52 (Summary re Dell and Cisco Overlapping

16   Commands) (charting 1600+ multi-word commands common to Dell and Cisco); Ex. 20 (Black

17   Rpt.) ¶¶ 179–81 (summarizing other vendors' use of overlapping commands); Ex. 15 (Li Dep.

18   Tr.) at 154–163 (Procket Networks made its CLI "bug-for-bug compatible" with Cisco's, with no

19   complaint from Cisco); Ex. 32 (Kasten (Juniper Networks) Dep. Excerpts)) at 15:5-16:7, 16:24-

20   17:3, 17:12-17 & 18:1-5 ███████████████████ 25:18-27:4, 29:5-22, 30:18-22 & 33:15-34:4

21   ██

22   ██████████████████ 38:21-40:8 & 43:3-17 ████████████████████████ 66-72

23   ███████████████████ Ex. 33 (Cato (Dell) Dep. Excerpts) at 35:4-36:8 (similarities of

24   Dell and Cisco CLI), 39:4-16 (customers expect familiar command syntax), 47:15-48:18 & 50:5-

25   52:4 (use of Cisco commands at customer request), 60:11-14, 61:15-19 & 62:24-65:13 (Dell,

26   Cisco, others all use same industry standard commands); Ex. 34 (Cato (Dell) Dep. Excerpts) 9at

27   42:8-43:3 (Dell consults standards and customer needs when creating commands); Ex. 35

28   (Venkatraman (HP) Dep. Excerpts) at 46:1-21 (discussing "standard show commands"), 71:21-

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1   72:6 (different vendors share commands and syntax), 96:7-22 (standard use of common,

2   consistent-looking CLI helps customers). Cisco disputes most of these facts (and their

3   significance), and resolving those disputes requires a full hearing of both parties' evidence.

4   The same functional and industry constraints, and the same disputes, apply to the asserted

5   help descriptions. Arista will prove—and Cisco disputes—that the help strings are unprotectable

6   because they are purely functional parts of an unprotectable help system, driven by the same

7   industry-standard and functional constraints as the commands. *See, e.g.*, Ex. 22 (Black Rebuttal

8   Rpt. ¶¶ 143–145 (help strings are functional phrases describing what commands do), Ex. 37

9   (Black Decl.) ¶ 73; Ex. 38 (Black Supp. Rpt.) ¶¶ 60–63, 68 (extensive use of generic functional

10   industry terms and expressions pre-dating Cisco); *id.* Exs. 53-56 (Black Apps. O, P & Q) (same);

11   Ex. 38 (Black Supp. Rpt.) ¶ 63 (pre-Cisco use of "Transmission Control Protocol"); *id.* ¶¶ 66–67

12   (RFC 1213 source for "identification of the contact person for this managed node"); *id.* ¶ 93 ("the

13   bulk of the key terms and phrases used in their help strings were actually created outside of Cisco

14   and adopted wholesale by Cisco engineers"); *id.* ¶¶ 76–77 (limited options mean multiple authors

15   likely to create same strings independently); Ex. 39 (Lougheed 9/16/16 Dep. Excerpts) at

16   587:25–588:5; Ex. 38 (Black Supp. Rpt.) ¶ 78 (low degree of overlapping help strings consistent

17   with functional need to implement standard technical features / protocols); Ex. 38 (Black Supp.

18   Rpt.) ¶ 58 (help strings part of a functional "system"; similar help systems used throughout

19   industry); *id.* ¶ 67 (severe constraints in "choosing short phrases to describe strictly-defined

20   terminology"); *id.* ¶ 68 (absence of creativity).

21   Finally, the evidence will show that many of the asserted "commands" are not the actual

22   commands accepted by Cisco or Arista switches (and thus not protectable as asserted), because

23   Cisco's representations of these commands omit necessary words and parameters. Ex. 20 (Black

24   Rpt.) ¶¶ 182, 491; Ex. 57-63 (Black Rebuttal Rpt. App. N) (Arista command syntax for 397

25   incomplete asserted commands). This issue is related to the *scenes a faire* questions outlined

26   above, and also cannot be resolved on a paper record, because the use of stripped-down versions

27   of commands makes the asserted commands more clearly *scenes a faire* dictated by functional

28   and industry constraints.

ARISTA'S BRIEF RE ANALYTIC DISSECTION OF ASSERTED WORKS
Case No. 5:14-cv-05344-BLF (NC)

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Respectfully submitted,

Dated: November 8, 2016   KEKER & VAN NEST LLP

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                                                ARISTA NETWORKS, INC.

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